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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Mr. Christopher J. Wright
General Counsel
Federal Communications Commission
445 12th Street, SW – The Portals
Washington, D.C. 20554

Re: Review of Freedom of Information Action
Control No. 99-163; CC Docket No. 99-117

Dear Mr. Wright:

BellSouth Corporation ("BellSouth") hereby seeks full Commission review of the July 27, 1999 Letter Ruling ("Letter Ruling") of the Common Carrier Bureau ("Bureau") granting a Freedom of Information Act ("FOIA") Request ("Request") by MCI Telecommunications Corporation ("MCI") for access to raw audit data submitted by BellSouth in connection with the Commission's Continuing Property Records ("CPR") audit. The letter ruling also grants MCI access to workpapers prepared by the Commission's audit staff. This request for review is submitted pursuant to Section 0.461(i) of the Commission's Rules.[1] As shown below, the Letter Ruling violates an unbroken string of Commission precedents. It also is contrary to recent rulemaking action codifying the audit exception to the FOIA. It fails to apply the standards set forth in the Commission's rules. And as this Commission and the courts have recognized in

[1] The letter ruling purports to deny BellSouth's "requests for confidentiality, pursuant to Section 0.459(g) of the Commission's rules." Letter Ruling at 5. BellSouth did not submit a request for confidentiality under Section 0.459 of the Rules. As BellSouth explained in its July 12, 1999 opposition to MCI's FOIA request, the audit data submitted by BellSouth is exempt from mandatory disclosure pursuant to Section 0.457(d) of the Rules. Therefore, BellSouth was not required to justify non-disclosure under Section 0.459 of the Rules. The Letter Ruling therefore denied a request that BellSouth did not make. The staff informed BellSouth that because the Letter Ruling was grounded in Section 0.459(g) of the Rules, BellSouth's Application for Review was due five business days after the ruling. BellSouth strongly disagrees with this interpretation of the Rules. BellSouth's right to review is grounded in Section 0.461(i) of the rules, which provides ten business days to seek review of a staff order granting a FOIA request. Out of an abundance of caution, BellSouth is filing this Application for Review within five business days after the Letter Ruling.

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prior rulings, it will severely damage the Commission's ability to conduct future audits. It does all these things in the factual context of an information request that is not even relevant to the underlying proceeding in which the information will purportedly be used. The Commission should overrule the unfortunate policy choices made by the Bureau and deny MCI's FOIA request.

I. Introduction.

During 1997 and 1998, the Accounting Safeguards Division ("ASD") of the Common Carrier Bureau conducted an audit of BellSouth's CPR. The ASD invited BellSouth to request rescoring of any items where BellSouth disagreed with the staff's scoring. BellSouth responded with a binder of backup materials supporting its request for rescoring. In December, 1998, the ASD provided BellSouth with a draft audit report and invited BellSouth to respond. On March 12, 1999 the Commission issued an order releasing the ASD's audit report and BellSouth's response to the public. ASD File No. 99-22. On April 7, 1999 the Commission released a Notice of Inquiry ("NOI"), CC Docket No. 99-117, which invited public comment on the audit report and BellSouth's response thereto. The NOI, among other things, sought comment on Issue No. 2: "[T]he validity and reasonableness of the methodology used by the Bureau's auditors in determining whether to rescore or to modify a finding during the field audit that equipment was 'not found'." At the same time, the Bureau released a Public Notice, DA 99-668, that described in detail the methodology used by the Bureau in deciding whether or not to rescore items that were "not found" during the field visit.

On June 22, 1999, MCI filed a FOIA request. MCI requested access to "any materials that the RBOCs have submitted to the [ASD] to explain why hard-wired COE equipment items were not found by the auditors or to support claims that items in the audit sample should be 'rescored'." Request at 1. MCI also requested public disclosure of "audit work papers generated by ASD staff during the course of the audits that show or support the item-by-item scoring of the items in the audit sample." Finally, MCI requested that the Commission "disclose the CPR detail (vintage, description, etc.) for any items scored 'partially found,' 'not found,' or 'not verifiable' at any time during the audit process." Request at 2. On July 12, 1999, BellSouth filed an opposition to MCI's FOIA request. On July 27, 1999 the Bureau issued its Letter Ruling granting MCI access to the raw audit data submitted by BellSouth and to the Staff's workpapers dealing with the rescoring request, subject to a protective order.

II. The Letter Ruling.

The Letter Ruling asserts that the release of audit materials "satisfies the compelling interest of providing parties access to the information in issue so that they have a reasonable opportunity to comment on NOI Issue No. 2." Letter Ruling at 2. It alleges that "the specific question raised in our NOI concerning the ASD auditors' rescoring process can only be answered by allowing parties interested in filing comments to review this material." Id. It claims that since the release is discretionary, "it does not serve as precedent for future requests under FOIA or otherwise." Letter Ruling at 3. It

claims that allowing release through a protective order can ameliorate any potential competitive harm to BellSouth. Letter Ruling at 2.

III. The information sought by MCI is not needed to respond to Issue No. 2.

The only reason given by the Bureau in the Letter Ruling for releasing the raw audit information requested by MCI is the repeated assertion that Issue No. 2 "can only be answered by allowing parties interested in filing comments to review this material." Letter Ruling at 2-3. However, neither MCI nor the Bureau attempts to demonstrate that this assertion is true.

Issue No. 2 sought comment on: "The validity and reasonableness of the methodology used by the Bureau's auditors . . . ." NOI at 3. Thus, the only issue as to which comment was sought related to the methodology used by the Bureau, not the accuracy of the individual scoring decisions made by the auditors. To facilitate public comment on Issue No. 2, on the same day the NOI was released the Bureau released a Public Notice, "The Accounting Safeguards Division Releases Information Concerning Audit Procedures for Considering Requests by the Regional Bell Operating Companies to Reclassify or "Rescore" Field Audit Findings of Their Continuing Property Records", DA 99-668 (rel. April 7, 1999). That document set forth in detail the methodology employed and the factors considered by the Bureau in evaluating requests for rescoring. The Public Notice is more than sufficient to allow interest parties to comment on the validity and reasonableness of the methodology used by the staff in deciding whether to reclassify individual items.

In its FOIA request, MCI's entire justification for seeking access to the raw audit data requested is contained in a single sentence: "In order to address the issue of whether the rescoring methodology used by the Bureau auditors was valid and reasonable, interested parties must be able to examine, on an item-by-item basis, the auditors' scoring decisions and the material the RBOCs submitted in support of their requests to 'rescore' an item." Request at 2. MCI makes no attempt to demonstrate the truth of this assertion. Why is it necessary to evaluate hundreds of individual scoring decisions in order to comment on the validity of the methodology employed by the auditors? Neither MCI nor the Letter Ruling says. Why is the Commission attempting to rely on a third party to determine if the staff auditors made correct judgmental audit decisions, especially when that third party is a competitor that stands to benefit if any enforcement action is taken against BellSouth?

The Letter Ruling orders the release of significantly more information than is necessary to address the scoring decisions referenced in Issue 2, and significantly more information than MCI requested. Issue 2 of the NOI asks for comment on the methodology used to classify items as "not found". In BellSouth's case, that is 116 items. MCI expanded the request to ask for the data pertaining to items scored "partially found","not found" or "not verifiable". Request at 2. This expanded the universe to 215 items in BellSouth's case. MCI specifically acknowledged that it was requesting CPR detail for "at most, approximately 300 items for each RBOC." Request at 3. The Bureau,

however, ordered the release of CPR detail "of all sampled items and all undetailed investment." Protective Order, para. 1(c)(i). This amounts to 1152 items for each Bell company. Thus, the Letter Ruling thus orders the release of more than five times the information requested by MCI and more than ten times the information that was identified in Issue 2.

This is a NOI, not an enforcement proceeding. If, at the end of this proceeding, the Commission determines that no enforcement proceedings are justified, the validity of the individual scoring decisions will never become relevant. If enforcement proceedings are initiated, then and only then will individual scoring decisions become relevant. It is entirely inappropriate for the Commission to depart from an unbroken string of precedents regarding the confidentiality of raw audit data by granting MCI's request in this proceeding.

IV. Release of raw audit data in unprecedented.

In an unbroken string of decisions going back a decade, the Commission has consistently refused to release raw audit data in response to FOIA requests.[2] The Commission recognized three reasons why audit material should not be released: 1) Audit material is exempt from disclosure under the FOIA, so the Commission is under no legal obligation to release audit information; 2) carriers have an expectation of privacy in audit materials, and release of audit information would breach that expectation of privacy; and 3) if the expectation of privacy is breached, the Commission's ability to conduct future audits efficiently will be impaired. In the rare case when the Commission has found that the public interest requires the release of audit information, the Commission has limited the information released to only summary information or the audit report itself.

Less than a year ago, the Commission conducted a comprehensive review of its policy concerning treatment of confidential information submitted to the Commission. In the Matter of Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission, GC Docket 96-55, **Report and Order**, FCC 98-184, released August 4, 1998. In that proceeding, the Commission discussed what would constitute a "persuasive showing" justifying the release of confidential information in the possession of the Commission. The Commission stated:

> [T]he Commission generally has exercised its discretion to release publicly information falling within FOIA Exemption 4 only in very limited circumstances, such as where a party has placed its financial condition at issue in a Commission proceeding, or where the Commission

[2] *See, e.g., Scott J. Rafferty*, 5 FCC Rcd 4138 (1990); *Martha H. Platt*, 5 FCC Rcd 5742 (1990); *David J. Stoner*, 5 FCC Rcd 6458 (1990); *National Exchange Carrier Association*, 5 FCC Rcd 7'48 (1990); *GTE Telephone Operating Companies*, 9 FCC Rcd 2588 (1994); *The Bell Telephone Operating Companies*, 10 FCC Rcd 11541 (1995).

has identified a compelling public interest in disclosure. **Report and Order** at ¶ 8.

The Commission reiterated that the "requester of such information should continue to bear the burden of making a persuasive showing as to the reasons for inspection when access to confidential information is sought."" **Report and Order** at ¶ 19. With regard to audit information, the Commission reiterated its "longstanding policy of treating information obtained from carriers during audits as confidential." **Report and Order** at ¶ 54. The Commission stated:

> Carriers have a legitimate interest in protecting confidential information, and we agree that disclosure could result in competitive injury to those who provide such information to the Commission. This policy is also designed to enhance the efficiency and integrity of our audit process by encouraging carriers to comply in good faith with Commission requests for information. Moreover, the Commission considers audit reports to be internal agency documents that, consistent with FOIA Exemption 5, generally should not be disclosed to the extent they present staff findings and recommendations to assist the Commission in pre-decisional deliberations. Since we are able to make a finding that audit materials received from carriers generally fall within FOIA Exemption 4, and as an indication of the importance we place on upholding the confidentiality of these materials, we will amend Section 0.457 of our rules to indicate that information submitted in connection with audits, investigations and examinations of records will not routinely be made available for public inspection. **Report and Order** at ¶ 54.

In this case, the Commission has already weighed the factors for and against disclosure and has determined that the proper balance was to release the staff's audit report and the carriers' responses thereto. The Letter Ruling ignored that choice by the Commission. The Letter Ruling also violates the Commission's Rules by failing to require MCI to make a "persuasive showing as to the reasons for inspection...." 47 C.R.F. Sec. 0.457(d)(2). As shown above, MCI has not even shown how the requested material is relevant to its comments on the NOI.

V. Release of raw audit data is not required by law.

The Letter Ruling concludes that the Commission is under no legal obligation to grant MCI's FOIA request. In this regard, the Bureau is clearly correct. The Freedom of Information Act, 5 U.S.C.A. § 552, generally requires release of information in the possession of federal agencies upon request to a member of the public. There are certain express exceptions to the disclosure requirement, three of which are controlling here. Section 552(b) provides, in pertinent part:

> (b) This section does not apply to matters that are—
>
> . . .

(3) specifically exempted from disclosure by statute (other than section 552b of this Title), provided that such statute . . . refers to particular types of matters to be withheld;

(4) trade secrets and confidential or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law other than an agency in litigation with the agency; . . .

Section 220(f) of the Communications Act prohibits disclosure by any Commissioner, officer or employee of the Commission of "any fact or information which may come to his knowledge during the course of examination of books or other accounts, as hereinafter provided, except insofar as he may be directed by the Commission or a Court." This is specific statutory authority sufficient to exempt audit information from disclosure under Section 552(b)(3).

VI. Release or raw audit data is a poor policy choice.

Having concluded that release of the information requested by MCI is purely discretionary, the Letter Ruling then makes the following incredible statement: "Because the release of this information is discretionary, it does not serve as precedent for future requests under FOIA or otherwise." Letter Ruling at 3. The most charitable thing that can be said about this statement is that it is incredibly naïve. The Letter Ruling orders the release of raw audit information on the unsupported claim by MCI that the information requested is necessary to prepare its comments on Issue No. 2. As shown above, the information requested is not even relevant to the question posed by the Commission in Issue No. 2. Furthermore, the Bureau did not follow the Commission's rules and require MCI to make a "persuasive showing" as to its need for the requested information.

The Letter Ruling also makes it clear that the Bureau made no attempt to weigh the harm to the carrier caused by the release of the requested information against the potential benefit that would accrue from giving MCI additional information to assist in preparing its comments on the NOI. Indeed, the Letter Ruling concedes that the Bureau did not even examine the documents in question prior to ordering their release.[3] In essence, what the Letter Ruling does is make discretionary release of audit information standardless. This is the worst possible precedent imaginable. In future audits, BellSouth and all other carriers will have to presume that its confidential information is subject to release to its competitors merely for the asking.

As the Commission has clearly recognized:

In the context of Commission audits, ... disclosure of ...raw data would likely impair our information-gathering abilities.... [T]he audit process

[3] Letter Ruling at 3: "Due to the volume and nature of the audit material in issue, without a line-by-line analysis, we cannot presumptively conclude that none of the requested materials fall under the ambit of Exemption 4."

> depends largely on the cooperation of carriers who generally have been willing, upon Commission request, to permit examination of existing documents, create new documents and allow employee interviews in the belief that such information will not be disclosed.... [T]he cooperation of carriers is essential to an efficient and productive audit. If raw data submitted by carriers is disclosed, it is likely that such voluntary assistance will diminish, especially since the audit process does not present the expectation of a government-bestowed benefit."[4]

The present audit is a perfect example. BellSouth believes that it is no overstatement to say that the ASD audit staff could not have performed the CPR audit without the extensive cooperation and assistance of BellSouth. In providing that cooperation and assistance, BellSouth operated with the full expectation, based on long history as well as the recent **Report and Order**, that the documents provided to the Commission would not be made public. If that expectation is destroyed in this proceeding, BellSouth will be forced to view future audits as possible precursors to litigation. In the absence of an expectation of confidentiality, the appropriate litigation strategy would be to respond very literally to an auditor's inquiry, to decline to create new documents at the request of the auditors, and to deny access to subject matter experts to assist the auditors. The Commission should carefully consider the full implications of the change in policy created by the Letter Ruling.

VII. A protective order is not sufficient to protect BellSouth and its vendors.

The Letter Ruling asserts that because the raw audit information will be released subject to a protective order, such disclosure "ameliorates any alleged threat of competitive injury to any RBOC...." Letter Ruling at 4. As shown above, threat of competitive injury is only one factor in the Commission's analysis. Indeed, the threat of disclosure of raw audit information to a competitor will change the way carriers approach future audits, with or without a protective order. In any event, the Bureau is wrong if it thinks a protective order will adequately protect BellSouth. The information being sought by MCI includes not only confidential and proprietary information of BellSouth, but also confidential and proprietary information of BellSouth's suppliers and vendors. Almost without exception BellSouth's contracts with vendors and suppliers includes obligations to keep such information confidential and in most cases cannot be released without the vendor or supplier's written consent.[5] Accordingly, the staff's decision to release the information requested by MCI would place an administrative burden on

[4] *Scott J. Rafferty*, 5 FCC Rcd 4138, para. 5 (1990).

[5] The contracts cover various vendors over several time periods, thus it would be inefficient for BellSouth to attempt to provide the contractual language from each of the potentially affected vendor agreements. Most of the agreements, however, contain a "Survival of Obligations" clause that requires the parties to comply with certain obligations, such as confidentially, after the term of the agreement has expired. Thus, BellSouth continues to be contractually obligated to keep such information from disclosure even though the contact may no longer be effective.

BellSouth to notify each vendor and attempt to obtain a written release.[6] Moreover, even if the vendors provided such a release, they would do so reluctantly. Having no guarantee of confidentially will no doubt have a chilling effect on future contract negotiations between BellSouth and its vendors and will reduce the necessary flow of information from vendors to BellSouth that BellSouth needs to operate its business.

VIII. Conclusion.

The Letter Ruling creates a devastating precedent that will fundamentally alter future audits. Carriers have relied on the Commission's unbroken precedent of refusing to release raw audit information in response to FOIA requests. The Commission only last year reiterated its intention to refuse to release any audit information (much less than raw documents) absent a "persuasive showing" by the requesting party that release of the information is necessary. In this case, the Commission made the policy decision that release of the audit reports and the carriers' responses thereto satisfied the need of parties participating in the NOI. The Bureau's decision in the Letter Ruling overrides that policy direction in shameless fashion. The Letter Ruling must be reversed, and MCI's FOIA request must be denied.

Sincerely,

M. Robert Sutherland

[6]If the vendor chose not to agree to the release of its confidential information it would of course possess legal rights to prevent such release beyond those being exercised by BellSouth.

CERTIFICATE OF SERVICE

I, Margaret J. Herman, do hereby certify that copies of the foregoing were sent via first class mail, postage paid, to the following on this 3rd day of August, 1999:

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